Supreme Court, U.S.
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No. 05-49

In The

Supreme Court of the United States

JANICE L. CONLEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The Eleventh Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether it is a fundamental miscarriage of justice to impose sentence in violation of the Fifth and Sixth Amendments to the United States Constitution under *United States v. Booker*, 543 U.S. ___, 125 S.Ct. 738, 73 USLW 4056 (2005). Specifically, whether the imposition of a federal sentencing guideline sentence was tantamount to imposition of a minimum mandatory sentence, because imposition of a guideline sentence was *mandatory* under the guidelines in effect prior to *Booker*. For a judge to be *required* by then existing law to impose what amounted to a minimum mandatory forty-one month prison sentence on a fifty-six year old woman with no prior criminal record for a white collar fraud offense with a relatively small loss amount, by a sentencing scheme that is now held to be *unconstitutional* is a fundamental miscarriage of justice; or alternatively, whether the procedural bar rule of *United States v. Frady*, 456 U.S. 152, 167-168, 102 S.Ct. 1584, 1594 (1982) must be waived, altered or abandoned in the context of the revolutionary upsetting of the federal sentencing guidelines and the sentences wrongly imposed under this unjust *pre-Booker* mandatory guideline scheme.

II. Whether *Booker* is not a "new rule" for purposes of retroactivity analysis under *Teague v. Lane*, but is merely an application of the rule of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000), to a new set of facts because the result in *Booker* was dictated and compelled by *Apprendi*, and therefore under *Yates v. Aiken*, 484 U.S. 211, 108 S.Ct. 534 (1988) and *Penry v. Lynaugh*, 492 U.S. 302, 314-315, 109 S.Ct. 2934, 2944-2945 (1989), Conley is entitled to the application of *Booker* to her timely first petition under 28 U.S.C. § 2255.

QUESTIONS PRESENTED – Continued

III. Alternatively, whether the *Booker* rule is entitled to retroactive application under *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060 (1989).

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, **JANICE L. CONLEY**, respectfully prays that a writ of certiorari issue to review the decision of the Eleventh Circuit Court of Appeals entered March 25, 2005 affirming without written opinion the denial of a certificate of appealability ("COA") by the United States District Court for the Middle District of Florida, of an appeal of a denial of a petition for relief under Title 28, United States Code, § 2255, based on a claim made under *United States v. Booker*, 543 U.S. ___, 125 S.Ct. 738, 73 USLW 4056 (2005).

OPINION AND DECISION BELOW

The decision without opinion of the Eleventh Circuit Court of Appeals (Appendix, *infra*, 1) was unreported. The decision and opinion of the Middle District of Florida denying relief under 28 U.S.C. § 2255 was also unreported but a copy of that decision and opinion is included in the Appendix, *infra*, 9.

JURISDICTION

Petitioner **JANICE L. CONLEY** filed in the United States District Court for the Middle District of Florida, Orlando Division, a timely motion under 28 U.S.C. § 2255 attacking the judgment and sentence in her federal criminal case. The original § 2255 motion was filed August 4, 2004, after *Blakely v. Washington*, ___ U.S. ___, 124 S.Ct. 2531 (2004), but prior to the decision in *United States v. Booker*, 543 U.S. __, 125 S.Ct. 738, 73 USLW 4056 (2005). Conley argued in her 2255 motion

that *Blakely* applied to the federal sentencing guidelines and that as the imposition of a mandatory guideline sentence violated her Fifth and Sixth Amendment rights. Conley elaborated that she was entitled to the application of *Blakely* to her initial, timely 2255 motion, because *Blakely* was not a "new rule" for retroactivity analysis purposes, but merely an extension of an existing rule, *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000), a rule announced prior to her sentencing, therefore she was entitled to this extension of a new rule; alternatively Conley argued that *Blakely* should be applied retroactively under *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060 (1989). The District Court summarily denied Conley's 2255 motion on August 24, 2004 on *Frady* procedural bar grounds (*United States v. Frady*, 456 U.S. 152, 167-168, 102 S.Ct. 1584, 1594 (1982)) and denied her request for a certificate of appealability ("COA") on October 25, 2004. Conley renewed her request for a COA at the Eleventh Circuit Court of Appeals which denied the COA on December 27, 2004. Conley then filed a motion styled Petition for Rehearing En Banc, which the Eleventh Circuit treated as a motion for reconsideration which was denied by an order signed by Judges Birch and Barkett and filed March 25, 2005. This petition followed in a timely manner. This Court has jurisdiction to review the decision of the United States Court of Appeals for the Eleventh Circuit pursuant to Title 28 U.S.C. § 1254(1). *Hohn v. United States*, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998).

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The Sixth Amendment to the United States Constitution provides:

> Amendment VI. Jury trials for crimes, and procedural rights
>
> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF FACTS MATERIAL TO THE ISSUES PRESENTED

Petitioner Conley was tried by jury and convicted in a white collar fraud case. She was sentenced in accordance with the federal sentencing guidelines. The sentencing judge determined the pertinent factors which determined the sentence based on a probation officer's presentence investigation report and argument of counsel at the sentencing proceeding. The factors were determined by the judge based on a preponderance of evidence. The factors were not pled in the indictment. The factors were not proved beyond a reasonable doubt to the jury which tried the case. The burden of proof did not remain exclusively upon the government. There was no unanimous jury verdict on the sentencing factors. The use of the various sentencing factors determined by the judge and not the jury drove the sentencing range up from 0-6 months to 41-51 months, and Conley was sentenced to 41 months. The use of these same factors drove the fine range up as well and resulted in a fine of $7,500.

ARGUMENTS

I. Whether it is a fundamental miscarriage of justice to impose sentence in violation of the Fifth and Sixth Amendments to the United States Constitution under *Booker*. Specifically, whether the imposition of a federal sentencing guideline sentence was tantamount to imposition of a minimum mandatory sentence, because imposition of a guideline sentence was *mandatory* under the guidelines in effect prior to *Booker*. For a judge to be *required* by then existing law to impose what amounted to a minimum mandatory forty-one month prison sentence on a fifty-six year old woman with no prior criminal record for a white collar fraud offense with a relatively small loss amount, by a sentencing scheme that is now held to be *unconstitutional* is a fundamental miscarriage of justice; or alternatively, whether the procedural bar rule of *United States v. Frady*, 456 U.S. 152, 167-168, 102 S.Ct. 1584, 1594 (1982) must be waived, altered or abandoned in the context of the revolutionary upsetting of the federal sentencing guidelines and the sentences wrongly imposed under this unjust pre-*Booker* mandatory guideline scheme.

In denying the request for certificate of appealability, we respectfully submit that the Eleventh Circuit Court of Appeals has misapplied the controlling legal principles. The Eleventh Circuit's order relied upon the procedural default rule of *United States v. Frady*, 456 U.S. 152, 167-168, 102 S.Ct. 1584, 1594 (1982), which the court read to hold that a defendant who fails to raise an issue on direct

appeal is procedurally barred from raising the claim in a § 2255 motion, absent a showing of cause and prejudice for the default or a fundamental miscarriage of justice.

We submit that it is a fundamental miscarriage of justice to impose sentence in violation of the Fifth and Sixth Amendments to the United States Constitution under *Booker*. Specifically, the imposition of a federal sentencing guideline sentence was tantamount to imposition of a minimum mandatory sentence, because imposition of a guideline sentence was *mandatory* under the guidelines in effect prior to *Booker*. *Booker* has now upset almost twenty years of federal sentencing law by concluding that such a scheme is unconstitutional, and that a quick fix is to make the scheme advisory. For a judge to be ***required*** by then existing law to impose what amounted to a minimum mandatory 41 month prison sentence on a fifty-six year old woman with no prior criminal record for a white collar fraud offense with a relatively small loss amount, by a sentencing scheme that is now held to be *unconstitutional* is a fundamental miscarriage of justice.

To impose a mandatory prison sentence when probation could have been imposed, and to have done so as a result of an unconstitutional but mandatory sentencing scheme, is an error which must be corrected. Fundamental fairness and fundamental justice will not permit otherwise.

If our rules require this, then our rules must change.

Conley respectfully requests this honorable Court to grant her certificate of appealablity either by agreeing that the question of the fundamental miscarriage of justice deserves further encouragement and briefing or by concluding that *Frady* principles must not be applied to this

revolutionary upsetting of the federal sentencing guidelines and the sentences wrongly imposed under this unjust scheme.

II. Whether *Booker* is not a "new rule" for purposes of retroactivity analysis under *Teague v. Lane*, but is merely an application of the rule of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000), to a new set of facts because the result in *Booker* was dictated and compelled by *Apprendi*, and therefore under *Yates v. Aiken*, 484 U.S. 211, 108 S.Ct. 534 (1988) and *Penry v. Lynaugh*, 492 U.S. 302, 314-315, 109 S.Ct. 2934, 2944-2945 (1989), Conley is entitled to the application of *Booker* to her timely first petition under 28 U.S.C. § 2255.

The Eleventh Circuit held that *Booker* is not retroactive for purposes of an initial 2255 motion. This approach is incorrect. Rather, the proper analysis is to first determine whether a *Booker* claim comes under the *Yates v. Aiken*, 484 U.S. 211, 108 S.Ct. 534 (1988) and *Penry v. Lynaugh*, 492 U.S. 302, 314-315, 109 S.Ct. 2934, 2944-2945 (1989), exceptions to retroactivity analysis, and then only if not, then determine whether the *Booker* rule is entitled to retroactive application under *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060 (1989).

As dramatic an impact as *Booker* has made, it is not a "new rule" for purposes of retroactivity analysis under *Teague v. Lane*, but is merely an application of the rule of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000), to a new set of facts because the result in *Booker* was dictated and compelled by *Apprendi*. Therefore, under *Yates v. Aiken*, 484 U.S. 211, 108 S.Ct. 534 (1988) and

Penry v. Lynaugh, 492 U.S. 302, 314-315, 109 S.Ct. 2934, 2944-2945 (1989), Conley is entitled to the application of *Booker* to her timely, first petition under 28 U.S.C. § 2255.

A case announces a new constitutional rule if the Supreme Court bases its decision in the Constitution and the rule it announces was not dictated nor compelled by precedent. *Beard v. Banks*, ___ U.S. ___, 124 S.Ct. 2504, ___ L.Ed.2d ___ (2004). As dramatic as *Booker* seems, *Booker* merely reiterates the holding in *Apprendi* that, under the Sixth Amendment, all facts used to increase a defendant's sentence beyond the statutory maximum must be charged and proven to a jury. The rule announced in *Booker* is based in the Constitution and was clearly dictated and compelled by *Apprendi* and its progeny.

To decide Conley's petition, therefore, it is not necessary to determine whether *Booker* is *retroactively* applicable to cases on collateral review under *Teague v. Lane*. Many "new" holdings are merely applications of principles that are well settled at the time of conviction. As Justice Harlan explained in *Desist v. United States*, 394 U.S. 244, 89 S.Ct. 1030 (1969):

> The theory that the habeas petitioner is entitled to the law prevailing at the time of his conviction is, however, one which is more complex than the Court has seemingly recognized. First, it is necessary to determine whether a particular decision has really announced a 'new' rule at all or whether it has simply applied a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law . . . One need not be a rigid partisan of Blackstone to recognize that many, though not all, of this Court's constitutional decisions are grounded

> upon fundamental principles whose content does not change dramatically from year to year, but whose meanings are altered slowly and subtly as generation succeeds generation. In such a context it appears very difficult to argue against the application of the 'new' rule in all habeas cases since one could never say with any assurance that this Court would have ruled differently at the time the petitioner's conviction became final.

394 U.S., at 263-264, 89 S.Ct., at 1041.

This reasoning, which the Supreme Court endorsed in *Yates v. Aiken*, is controlling in Conley's case because the decision in *Booker* was merely an application of the principle that governed the decision in *Apprendi*, which had been decided before Conley's sentencing took place. *Cf. United States v. Johnson*, 457 U.S. 537, 549, 102 S.Ct. 2579, 2586, 73 L.Ed.2d 202 (1982): "[W]hen a decision of this Court merely has applied settled precedents to new and different factual situations, no real question has arisen as to whether the later decision should apply retrospectively. In such cases, it has been a foregone conclusion that the rule of the later case applies in earlier cases, because the later decision has not in fact altered that rule in any material way." *See also Truesdale v. Aiken*, 480 U.S. 527, 107 S.Ct. 1394, 94 L.Ed.2d 539 (1987) (*per curiam*); *Dunaway v. New York*, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979); *Lee v. Missouri*, 439 U.S. 461, 462, 99 S.Ct. 710, 711, 58 L.Ed.2d 736 (1979) (*per curiam*).

A fortiori it would follow that because *Booker* is merely an application of clear precedents, then *Booker* cannot be a new rule for retroactivity purposes. Because it is not a new rule, Conley is entitled to its application in her petition under *Yates* and *Penry*.

Booker does not impose any new obligations on the Federal government, instead it merely results in the abolition of the mandatory nature of the *guidelines*, putting the federal courts and federal judges back to where they had always been and reinstating a sentencing regime which had existed since the founding of the Republic. No *new* obligations are imposed by *Booker*, rather, the new and unconstitutional *obligations* of the Sentencing Guidelines are swept away, and federal judges are put back in control of federal sentencing where the Constitution has always placed them – exercising the same authority in the same manner as had been exercised for two hundred years.

III. Alternatively, whether the *Booker* rule is entitled to retroactive application under *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060 (1989).

Alternatively, if *Booker* is a "new rule," it should be accorded retroactive application because it is a watershed development and requires the observance of procedures implicit in the concept of ordered liberty and as such is retroactive under *Teague v. Lane*.

Conley argues in the alternative that *Booker* meets the first criterion of retroactivity under *Teague v. Lane*, that its holding is "implicit in the concept of ordered liberty." *Cf. Apprendi v. New Jersey*, 530 U.S. 466, 499, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) (Scalia, J., concurring) (absent *Apprendi's* rule jury trial right "has no intelligible content"); *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428 (2002) (Scalia, J., concurring) (*Apprendi* involves the fundamental meaning of the jury trial guarantee); *Blakely v. Washington*, ___ U.S., at ___, 124 S.Ct. 2531, 2536 (tracing *Apprendi's* conception of the jury trial right back

to Blackstone); *Duncan v. Louisiana,* 391 U.S. 145, 157-158, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968) (Sixth Amendment jury trial guarantee is a "fundamental right"). Its rule also is "central to an accurate determination" of sentencing factors which increase a statutory maximum. *Teague, supra,* at 313, 109 S.Ct. 1060. This is because *Booker* (from *Apprendi*) abolishes mandatory guideline sentencing by judicial fact finding fiat.

As we see in Conley's case – and it is by no means atypical of the Kafkaesque proceedings which routinely occurred under the federal Sentencing Guidelines – the scales tipped easily and readily in favor of the government's request for "enhancements" because nothing more than a preponderance of the evidence was required and that preponderance was decided by a single judge in the presence of the advocates in the midst of interruptions and argumentation.

Booker satisfies both prongs of the retroactivity requirement of *Teague v. Lane* and as such is subject to retroactive application to timely first petitions under 28 U.S.C. § 2255.

Teague's basic purpose strongly favors retroactive application of *Booker's* rule. *Teague's* retroactivity principles reflect this Court's effort to balance competing considerations. See 489 U.S., at 309-313, 109 S.Ct. 1060; *Mackey v. United States,* 401 U.S. 667, 675, 91 S.Ct. 1160, 28 L.Ed.2d 404 (1971) (Harlan, J., concurring in two judgments and dissenting in one); *Desist v. United States,* 394 U.S. 244, 256, 89 S.Ct. 1030 (1969) (Harlan, J., dissenting). On the one hand, interests related to certain of the Great Writ's basic objectives – protecting the innocent against erroneous conviction or punishment and assuring

fundamentally fair procedures – favor applying a new procedural rule retroactively. *Teague, supra,* at 312-313, 109 S.Ct. 1060; *Mackey,* 401 U.S., at 693-694, 91 S.Ct. 1171. So too does the legal system's commitment to "equal justice" *i.e.,* to "assur[ing] a uniformity of ultimate treatment among prisoners." *Id.,* at 689, 91 S.Ct. 1171.

Consider, too, the law's commitment to uniformity. *Mackey, supra,* at 689, 91 S.Ct. 1171. Is treatment "uniform" when two offenders each have been sentenced to guideline sentences through the use of procedures that we now know violate the Constitution – but one is allowed to rot in prison while the other receives a new, constitutionally proper sentencing proceeding?

Certainly the ordinary citizen will not understand the difference nor will the prisoner. That citizen and that prisoner will simply witness two individuals, both sentenced through the use of unconstitutional procedures, one individual serves out an unconstitutional sentence, the other returning home to her family, all through an accident of timing. How can any Court square such a result with the fundamental purpose of the Great Writ and a system of law based on reason and equal justice?

On the other hand, *Teague* recognizes that important interests argue against, and indeed generally forbid, retroactive application of new procedural rules. These interests include the "interest in insuring that there will at some point be the certainty that comes with an end to litigation"; the desirability of assuring that "attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community"; and the fact that society does not have endless resources to spend upon

retrials, which (where witnesses have become unavailable and other evidence stale) may well produce unreliable results. *Mackey, supra,* at 690-691, 91 S.Ct. 1160 (internal quotation marks omitted); see also *Teague,* 489 U.S., at 308-310, 109 S.Ct. 1060.

None of these interests, however, support denying retroactive application of *Booker*. Finality and an end to litigation would be hastened rather than delayed by retroactive application of *Booker*. Each inmate aggrieved by the federal sentencing guidelines would receive one final Constitutional resentencing. The focus would be on whether the inmate can be safely restored to the community not on technical absurdities. Finally, and most importantly, imagine the huge net benefit and savings of resources which would result from opening the prison doors to the thousands of federal inmates senselessly imprisoned for decades or life because mandated by the federal Sentencing Guidelines.[1] The vast majority of federal inmates are persons like Conley – convicted of non-violent offenses and suffering under guideline sentences that defy rational explanation serving only to embitter the inmate, her family and friends, to create disrespect for the federal judicial system, and needlessly burden the taxpayers with the costs of unnecessary incarceration.

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[1] The federal Bureau of Prisons webpage states that it is responsible for over 180,000 federal inmates. Of incarcerated inmates, *less than ten percent were convicted of crimes of violence*. BOP data suggests that it costs on average $22,176 per year to house a federal inmate. This amounts to almost Four Billion Dollars ($4,000,000,000.00) per year. There is no question but that it would result in a net savings of resources to apply *Blakely* retroactively, assuming that there was on average a reduction in sentence imposed under the *Blakely* resentencings.

It is not enough, and it is not right, to simply call a halt to mandatory federal sentencing guidelines. Instead, the Courts – this Court – must go back and right the wrongs that have been committed in the name of the guidelines. Persons such as Janice Conley who have been unconstitutionally deprived of their liberty have the right to be resentenced at a rational, fair and *Constitutional* sentencing proceeding.

There was much wrong and little right about the federal sentencing guidelines, but one concept that the guidelines paid lip service to deserves mention – acceptance of responsibility. Now is the time and this is the case for the Court to accept responsibility for the guidelines. The first small step in that direction would be to grant Janice Conley's certificate of appealability.

CONCLUSION

Based on the foregoing, Petitioner **JANICE L. CONLEY,** respectfully requests this Honorable Court grant her petition for a writ of certiorari to the Eleventh Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-15516-A

JANICE L. CONLEY,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(Filed Dec. 27, 2004)

ORDER:

Appellant's motion for a certificate of appealability, as construed from the notice of appeal, is DENIED because appellant has failed to make the requisite showing. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478, 120 S.Ct. 1595, 1600-01, 146 L.Ed.2d 542 (2000). Because appellant failed to file a direct appeal, her claim that her sentence violated *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), as applied in *Blakely v. Washington*, 542 U.S. ___, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), is procedurally defaulted. *See United States v. Frady*, 456 U.S. 152, 167-68, 102 S.Ct. 1584, 1594, 71 L.Ed.2d 816 (1982) (holding that a defendant who fails

to raise an issue on direct appeal is procedurally barred from raising the claim in a § 2255 motion, absent a showing of cause and prejudice for the default or a fundamental miscarriage of justice); *see also McCoy v. United States*, 266 F.3d 1245 (11th Cir. 2001) (holding that *Apprendi* claims cannot be raised in an initial 28 U.S.C. § 2255 motion because they (1) are not jurisdictional in nature; (2) are barred by the non-retroactivity analysis set forth in *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989); and (3) can be procedurally defaulted if not raised on direct appeal). Also, because appellant failed to make the requisite showing to overcome the procedural default, the district court properly denied her § 2255 motion.

Appellant's motion for leave to proceed *in forma pauperis is* DENIED AS MOOT.

/s/ [Illegible]
UNITED STATES
CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

JANICE L. CONLEY,

Petitioner,

v. Case No. 8:01-CR-440-T-27MSS
8:04-CV-1795-T-27MSS

UNITED STATES
OF AMERICA,

Respondent. /

ORDER

This cause is before the Court on Petitioner's motion to vacate, set aside, or correct her sentence filed pursuant to 28 U.S.C. § 2255 (CV Dkt. 1). The Court has undertaken the review required by Rule 4(b), Rules Governing Section 2255 Proceedings for the United States District Courts,[1] and finds, for reasons set forth below, that service of the motion is not required.

Background

While employed as a Contract/Budget Administrator for GTE Data Services, Inc., (hereinafter "GTED") in its Health Care Systems Division, Petitioner was responsible for division accounting and invoicing. Under contract to Blue Cross/Blue Shield of Florida, GTED provided the

[1] Rule 4(b) provides, in pertinent part, that "[i]f it plainly appears from the face of the motion and any annexed exhibits and the prior proceedings in the case that the movant is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the movant to be notified."

computer services required to process Medicare Part B health insurance claims. Certain irregularities brought to the attention of internal auditors triggered an investigation which led to the discovery that funds were being diverted from one project to another within the company and records were falsified which resulted in overbilling of certain GTED clients, effectively leading to the overstatement of the profitability for Petitioner's division. Overbillings to the United States government resulted in a federal investigation. On February 28, 2002, Petitioner was charged in a second superseding indictment with conspiracy, in violation of 18 U.S.C. § 371 (Count 1); mail fraud, in violation of 18 U.S.C. §§ 1341 and 1342 (Count 2); filing false medicare claims in violation of 18 U.S.C. § 287 (Counts 3 and 4), and mail fraud in violation of 18 U.S.C. §§ 1341 and 1346 (Count 5) (CR Dkt. 31). Represented by counsel, Petitioner proceeded to trial on March 25, 2003 (CR Dkt. 155). On May 1, 2003, the jury returned a guilty verdict on all counts (CR Dkt. 190). Petitioner was sentenced on August 5, 2003, to serve concurrent terms of 41 months imprisonment on each count, to be followed by a 24-month term of supervised release (CR Dkt. 209). Petitioner did not file an appeal.

On August 4, 2004, Petitioner filed the instant motion and supporting memorandum of law (CV Dkts. 1 & 2). In her motion, Petitioner asserts that she was "denied her rights under the Fifth and Sixth Amendments to the United States Constitution, under *Apprendi v. New Jersey,* [530 U.S. 466, 490 (2000)], as applied by *Blakely v. Washington*, [___ U.S. ___ 124 S.Ct. 2531, ___ L.Ed.2d ___, 2004 WL 1402697 (Jun. 24, 2004)]" (CV Dkt. 1, Attach.).

For reasons set forth below, the Court finds that since "it plainly appears from the face of the motion and . . . the

prior proceedings in the case that [Petitioner] is not entitled to relief," the motion is subject to summary dismissal. Rule 4, Rules Governing Section 2255 Proceedings.

A review of the record confirms that Petitioner failed to file a direct appeal. Claims not raised previously, although previously available, are barred by procedural default absent a showing of cause and actual prejudice. *See Bousley v. U.S.*, 523 U.S. 614, 622 (1998); *United States v. Frady*, 456 U.S. 152, 166 (1982) (stating that "a collateral challenge may not do service for an appeal."); *Mills v. United States*, 36 F.3d 1052, 1055-56 (11th Cir. 1994) (finding that "[g]enerally speaking, an available challenge to a criminal conviction or sentence must be advanced on direct appeal or else it will be considered procedurally barred in a § 2255 proceeding."). In a more recent decision, the Eleventh Circuit held as follows:

> Courts have long and consistently affirmed that a collateral challenge, such as a § 2255 motion, may not be a surrogate for a direct appeal. *See, e.g., United States v. Frady*, 456 U.S. 152, 165, 102 S.Ct. 1584, 1593, 71 L.Ed.2d 816 (1982) (collecting cases). Because collateral review is not a substitute for a direct appeal, the general rules have developed that: (1) a defendant must assert all available claims on direct appeal, *Mills v. United States*, 36 F.3d 1052, 1055 (11th Cir. 1994); and (2) "[r]elief under 28 U.S.C. § 2255 'is reserved for transgressions of constitutional rights and for that narrow compass of other injury that could not have been raised in direct appeal and would, if condoned, result in a complete miscarriage of justice.'" *Richards v. United States*, 837 F.2d 965, 966 (11th Cir. 1988) (quoting *United States v. Capua*, 656 F.2d 1033, 1037

> (5th Cir. Unit A Sep. 1981)). Accordingly, a non-constitutional error that may justify reversal on direct appeal does not generally support a collateral attack on a final judgment, *Frady*, 456 U.S. at 165, 102 S.Ct. at 1593, unless the error (1) *could not have been raised on direct appeal* and (2) *would, if condoned, result in a complete miscarriage of justice. Stone v. Powell*, 428 U.S. 465, 477 n. 10, 96 S.Ct. 3037, 3044 n. 10, 49 L.Ed.2d 1067 (1976).

Lynn v. United States, 365 F.3d 1225, 1232-33 (11th Cir. 2004) (footnotes omitted) (emphasis added).

Petitioner acknowledges that she did not file a direct appeal (CV Dkt. 1, Attach.). *See Lynn*, 365 F.3d at 1232-33. *See also United States v. Levy*, 2004 WL 1725406 (11th Cir. Aug. 3, 2004) (rejecting attempt to raise *Apprendi/Bradley* issue where no Sixth Amendment argument had been presented on appeal). She also acknowledges that the Supreme Court's decision in *Apprendi* was decided before her sentencing took place (CV Dkt. 2 at 27). As the Eleventh Circuit recently recognized, in *Blakely*, the Supreme Court merely extended the rule announced in *Apprendi*. *United States v. Levy*, 2004 WL 1725406 at *1 (11th Cir. Aug. 3, 2004). *See also In re Dean*, ___ F.3d ___, 2004 WL 1534788 (11th Cir. July 9, 2004) (discussing how *Blakely* was based on *Apprendi* and concluding *Blakely* is not retroactive to cases on collateral review).

Petitioner does not make any effort to demonstrate cause for the procedural default. While Petitioner does state that she did not file a direct appeal because "[t]rial counsel made no objection and did not file a notice of appeal" (CV Dkt. 1, Attach.), she does not raise an ineffective assistance of counsel claim and nothing presented in

the § 2255 motion indicates that trial counsel failed to consult with her regarding her right to appeal, that she was unaware of her right to file an appeal,[2] or that she communicated to trial counsel her interest in an appeal and he failed to file a notice of appeal. *See Roe v. Flores-Ortega*, 528 U.S. 470 (2000) (discussing trial counsel's failure to file notice of appeal).

The Court finds that because Petitioner failed to raise her *Apprendi/Blakely* claim on appeal, she is procedurally barred from proceeding on this claim in a § 2255 motion.

ACCORDINGLY, the Court **ORDERS** that:

1. Petitioner's motion to vacate, set aside, or correct an allegedly illegal sentence (CV Dkt. 1) is **DENIED**.

2. The Clerk is directed to enter judgment against Petitioner, terminate any pending motions, and close this case.

ORDERED in Tampa, Florida, on AUGUST 23rd, 2004.

/s/ James D. Whittemore
JAMES D. WHITTEMORE
UNITED STATES
DISTRICT JUDGE

[2] Following pronouncement of the sentence, the Court advised Petitioner that she had the right to appeal the judgment and sentence within ten days thereof (Dkt. 221 at 36). Petitioner was also informed that she was entitled to be represented by counsel on appeal, and if she could not afford to retain counsel, the Court would appoint counsel to represent her, and the Clerk would accept her notice of appeal without payment of the appellate filing fee. *Id.* Petitioner was cautioned that if she failed to file a notice of appeal within the allotted time, she would "waive or give up [her] right to appeal." *Id.*

SA/jsh

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

JANICE L. CONLEY, Petitioner,	)	Case No. 8:01-CR-440-T-27MSS 8:04-CV-1795-T-27MSS
v.	)	
UNITED STATES OF AMERICA, Respondent.	)	

ORDER

Petitioner has filed a Notice of Appeal (Dkt. 7) and a Request for Certificate of Appealability pursuant to Rule 22, Fed. R. App. P.,[1] and 28 U.S.C. §2253[2] (Dkt. 8). Petitioner

[1] "Certificate of Appealability. (1) in a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. §§ 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. §§ 2253(c). If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue. . . . If no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals." Rule 22, Fed. R. App. P.

[2] "[I]n a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held. . . . (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from – . . . (B) the final order in a proceeding under section 2255. . . . (2) A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c).

challenges the August 23, 2004 order denying her motion for relief under 28 U.S.C. §2255 (Dkt. 5).

Where a district court has rejected a petitioner's constitutional claims on the merits, the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Eagle v. Linahan*, 268 F.3d 1306 9 (11th Cir. 2001). When the district court has rejected a claim on procedural grounds, the petitioner must show *both* that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right *and* whether the district court was correct in its procedural ruling. *Slack*, 529 U.S. at 484; *Franklin v. Hightower*, 215 F3d 1196, 1199 (11th Cir. 2000) (per curiam). The Supreme Court provided guidance in the application of the two-prong test for issuance of a COA where the petition was dismissed on procedural grounds, stating as follows:

> Determining whether a COA should issue where the petition was dismissed on procedural grounds has two components, one directed at the underlying constitutional claims and one directed at the district court's procedural holding. Section 2253 mandates that both showings be made before the court of appeals may entertain the appeal. Each component of the § 2253(c) showing is part of a threshold inquiry, and a court may find that it can dispose of the application in a fair and prompt manner if it proceeds first to resolve the issue whose answer is more apparent from the record and arguments. The recognition that the "Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of," *Ashwander*

> *v. TVA*, 297 U.S. 288, 347, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring), allows and encourages the court to first resolve procedural issues. The *Ashwander* rule should inform the court's discretion in this regard.

Slack, 529 U.S. at 484-85.

Noting that Petitioner acknowledged that she did not file a direct appeal, the Court found that because Petitioner failed to raise her *Apprendi/Blakely* claim on appeal, she is procedurally barred from proceeding on the claim in a § 2255 motion (Dkt. 5). Since Petitioner's motion was dismissed on procedural grounds and she has not demonstrated that this procedural question is debatable among jurists of reason, *see Lynn v. United* States, 1232-33 (11th Cir. 2004) (footnotes omitted) (emphasis added), the Court should not evaluate the merit of the claim. See *Slack*, 529 U.S. at 485; *Franklin*, 215 F.3d at 1199.

ACCORDINGLY, the Court **ORDERS** that Petitioner's Application for a Certificate of Appealability (Dkt. 8) is **DENIED**.

ORDERED in Tampa, Florida, on October 25, 2004.

/s/ James D. Whittemore
JAMES D. WHITTEMORE
UNITED STATES
DISTRICT JUDGE

SA/jsh
Copy to: All Parties of Record

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-15516-A

JANICE L. CONLEY,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(Filed Mar. 25, 2005)

Before **BIRCH and BARKETT, Circuit Judges.**

BY THE COURT:

Upon reconsideration of the Clerk's entry of dismissal on December 27, 2004, appellant's "Request for Permission to File Out of time Her Petition For Rehearing," which is construed as a motion to reinstate the appeal, is GRANTED.

Appellant has filed a "Petition for Rehearing *En Banc*," which is construed as a motion for reconsideration of this Court's order dated December 27, 2004, denying a certificate of appealability, as construed from her notice of appeal. Upon reconsideration, appellant's motion for a certificate of appealability is DENIED because appellant

has failed to make the requisite showing. *Slack v. McDaniel*, 529 U.S. 473, 478, 120 S.Ct. 1595, 1600-01, 146 L.Ed.2d 542 (2000); *see also United States v. Frady*, 456 U.S. 152, 167-68, 102 S.Ct. 1584, 1594, 71 L.Ed.2d 816 (1982); *Felker v. Turpin*, 83 F.3d 1303, 1312 (11th Cir. 1996) (in order to show a fundamental miscarriage of justice, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in light of newly discovered, reliable evidence of innocence not presented at trial); *Varela v. United States*, No. 04-11725, manuscript op. at 8 (February 17, 2005).